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Joseph Judkins, Dan J. Miller, Frank Oborn and Adrian De Bloois v. Boyd N. Fronk : Brief of Respondents

Utah Supreme Court

Lewis J. Wallace; Glenn W. Adams; Attorneys for Plaintiffs and Respondents;

Case No. 7600

IN THE

SUPREME COURT

OF THE STATE OF UTAH

JOSEPH JUDKINS, DAN J. MILLER,
FRANK OBORN, and ARDIAN DE BLOOIS,

Plaintiffs and Respondents,

vs.

BOYD N. FRONK,

Defendant and Appellant

Respondents' Brief

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Respondents do not controvert Appellant's Statement of Facts as being inconsistent, but contend his statement is incomplete in many vital particulars and therefor submit their own Statement of Facts as follows:

RESPONDENTS' STATEMENT OF FACTS

On the 16th day of January, 1942, the War Production Board was established by executive order by the President of the United States and given authority to allocate, ration and control the use of building and other materials, which were necessary in the carrying on of war. (Fdgs. Par. 6) That said board was functioning and its controls in effect at the time the defendant received a building permit on June 7, 1945, to construct a store and gas station on the property in question. That defendant is a carpenter by trade and has been for many years and knew, on June 7, 1945, when he applied for a building permit, that there were shortages and a priority on building

materials and that there had been during the years 1943, 1944 and 1945. (Fdgs. Par. 12 Tr. 65)

That the permit No. 3228 D issued was for erection of a store and service station building 20 by 40 feet, valuation of proposed work $3,000.00, fee paid $6.00 (Fdgs. Par. 10, Exh. G)

That the permit issued had written on the face thereof a provision providing in part as follows:

> "And the said party is further notified and warned under penalties provided by the Revised Ordinance of Ogden City, that they must conform to all of said ordinances, and all rules and decisions of the Building Inspector, and all work to be done in accordance with the statement set forth herein and that no changes in or departure from the general dimensions or construction described above, and further shown by the plans and specifications filed, will be allowed without permission and approved by the Building Inspector. This permit is void if work is not commenced within 60 days or if work is suspended for 60 days."

Also in effect at the time of the issuance of the permit in 1945 was an ordinance which adopted a Building Code which contained the following provisions:

> "Every permit issued by the Building Officials under the provisions of the Code shall expire by limitation and become null and void, if the building or work authorized by such permit is not commenced within 60 days from the date of such permit, or if the building or work authorized by such permit is

suspended or abandoned at any time after the work is commenced for a period of 60 days. Before such work can be recommenced a new permit shall be first obtained so to do, and the fee therefor shall be one-half the amount required for a new permit for such work, provided no changes have been made or will be made in the original plans and specifications for such work; and provided, further, that such suspension or abandonment has not exceeded one year." (Fdgs. Par. 3, Exh. H)

That the Appellant began work on the premises in June, 1945, and this work continued until March, 1946. That at no time have there been any foundation concrete poured for the building nor any construction of the station or store building nor use of said premises for the business of a store or service station. No construction work was done on said premises from March, 1946, until October, 1948, (Tr. 61, 62, 63, 64) and work on said premises and building was suspended continuously throughout this period. (Fdgs. Par. 4) The Appellant bought pipe in the summer of 1946, (Tr. 47, 48) but thereafter he did not make inquiry for materials nor exert any effort to go forward with the construction nor do anything looking to construction until he purchased two wash basins and two toilets for the station in the fall of 1947. (Fdgs. Par. 4, Tr. 62)

Appellant then did nothing on or off the premises furthering the project until his appearance before the City Commission in October 13, 1948. That the Appellant failed to comply with the conditions prescribed by the permit and building code designating time require-

ments for construction. (Fdgs. Par. 4)

That prior to and subsequent to the lifting of priorities and controls over building materials on July 25, 1947, a great many people did find materials and did construction work. (Tr. 73, Fdgs. Par. 13, Exh. I) That subsequent to the lifting of controls on July 25, 1947, materials were on a "first come, first served" basis. (Tr. 70)

That while demand for materials exceeded the supply, pipe was one of the most critical—one of the most desperate things—(Tr. 32, 36) and tanks and steel plate were critically short. (Tr. 38) Appellant obtained both of these items, pipe (Tr. 47, 48), tanks (Tr. 43).

That on October 13, 1948, Appellant filed an application with the City Engineer for erection of a service station on premises in Ogden, building 28 by 40 feet, valuation of proposed work $8,000.000. (Fdgs. Par. 10, Ex. B) fee specified of $18.00, was that for issuance of new permit. This application was denied by City Engineer. (Fdgs. Par. 8) Appellant then appeared before Ogden City Commission and requested that a building permit which he purchased three years ago be renewed. Engineer Kimball asked that the records show whether the permit is renewed or issued in exception to the ordinance. Thereupon Mayor Peery moved as follows:

> "Permit be issued to Boyd N. Fronk in exception to the ordinance providing the property owners in the neighborhood do not object within one week."

which motion was seconded and on vote carried. (Fdgs. Par. 8, Ex. C) That said motion did not require notice

to property owners in the neighborhood and no notice was in fact given them. (Fdgs. Par. 8) On October 28, 1948, the City Commission approved application of Appellant, (Ex. B) and permit No. 205-E issued.

That in August, 1946, ordinance No. 246 was enacted by Ogden City making the operation of a store or service station on the Appellant's property in question a nonconforming use which ordinance is now still in force and effect. (Tr. 3) This ordinance as enacted had no provision saving the rights of holders of then outstanding permits.

That Appellant plans on erecting a service station building pursuant to permit No. 3228-D or permit 250-E and respondents seek an injuction restraining construction and operation of service station building.

ARGUMENT

IN ANSWER TO APPELLANT'S POINT NO. 1

The permit of June 7, 1945, was issued under the following circumstances:

1. The War Production Board since 1942 had been exercising control over building materials denying allocations of them for commercial construction.

2. The Appellant was a carpenter and knew there were shortages of materials and a priority was necessary in the years 1943, 1944, and 1945.

3. That the permit issued provided on its face that it was to be void if work is suspended for 60 days. That the Appellant undertook the hazards attendant on this construction with the knowledge that if he were not able

to comply with the time requirements of the permit and work was suspended that the permit would be void, and rights under the permit lost.

Appellant cites 40 ALR 928.

The first paragraph of that annotation reads:

'This annotation does not include . . . nor does it include the right to revoke a permit where the owner does not proceed in accordance with the plans for the permit.''

That Appelant failed to meet the conditions of the permit by suspending work for more than 60 days and more than 1 year, and thus lost his rights under the permit.

In none of the cases cited by Appellant under Point No. 1 does it appear that the permits issued contained time and work suspension conditions nor reveal a building code in effect providing that permits expire by limitation and become void if work is suspended for 60 days.

Appellant cites Trans-oceanic Oil Corporation v. City of Santa Barbara, 194 P (2) 148. A permit was granted to drill for oil. ''It fixed no time as to when work was to be commenced or as to when the work was to be finished, its concluding sentence reading:

''This license terminates .....''

The blank was never filled in. P 150.

In a written Memorandum of Opinion the trial judge stated (P 152)

''That since the permit was silent upon the question of how soon appellant was required to commence drilling operations, it had a reasonable time in which

to proceed . . .''

At page 156, the court said the license or permit . . . is itself the permission and contains the conditions with which the permittee must comply in order to lawfully drill, and at Page 152 said:

> ''If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions granted the proper authorities may revode it.''

The last case cited by Appellant under Point No. 1, Atlas v. Dick, 81 NYS (2) 126 (1948) appears to have been reversed on appeal to the Appellant division. See 86 NYS (2) 231.

The following are cases in which the permittee failed to heed or comply with conditions of the permit and ordinances.

Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P (2) 4. California, (1943). Rehearing denied January 13, 1944. The defendant passed an emergency ordinance authorizing the waiver of health, safety and fire regulations pertaining to home construction during the war emergency. The plaintiff, under the ordinance, secured permission from the Federal Housing Authority to erect homes in a residential area, acquired the property and obtained a permit and prepared to erect 31 single family dwellings. On July 29, 1943, 27 permits and 4 others were granted to the plaintiff by the Central Permit Bureau and petitioner promptly started construction work, purchasing and moving materials on to the property, hiring and assembling

workmen and laying foundations for the buildings as specified. On August 4, 1943, a home owner near said tract took an appeal from the action of Central Permit Bureau in issuing permits, to the Board of Permit Appeals. The Board affirmed the action of the Permit Bureau and petitioner continued its construction work. Protestants filed petition for rehearing on September 4, which was heard on September 22, 1943, and on September 22, the board reversed its prior ruling and ordered the cancellation of all 31 permits. The plaintiff thereupon took an appeal directly to the court for a writ of mandamus commanding the reinstatement of the 31 permits and pointed out the expenditures made by him pursuant to the permits granted him.

The court, after discussing the propriety of the procedure by writ of mandate and the authority given the Board of Permit Appeals pointed out the following language in the permit:

> "This permit issued subject to appeal within 10 days to Board of Permit Appeals. Incur no expense under this permit until right of appeal had lapsed."

It also pointed out a provision of the ordinance providing "permitting discussion by the Board of Permit Appeals." Despite the plaintiff's appeal that an emergency for housing existed, that prompt construction work was necessary and funds expended, the court upheld the action of the Board of Permit Appeals in cancelling all of the permits previously issued, discharged the alternative writ and a peremptory writ was denied.

Also to Selligman, et al., v. Western and Southern Life Insurance company, Kentucky, 1938 126 SW (2)

419. In this case the building inspector issued a permit for a garage building on February 7, 1948, and work was begun immediately. On March 21, 1938, the building inspector issued a stop order, for failure to observe conditions in the permit, Re: Re-locate entrances, side line requirements and architecture conformity. The builder appealed to the Board of Adjustment and Appeals from the stop order. The Board upheld the stop order, denied the appeal from which order the builder prosecuted an appeal to the Circuit Court. The Circuit Court adjudged that the building permit issued February, 1938, was in full force and effect and the builder was authorized to complete the building of the garage pursuant to the permit. The Court of Appeals of Kentucky reversed the Circuit Court and justified the building inspector in stopping the work. The builder insisted that the building inspector could not lawfully revoke the permit because large sums of money were spent in reliance on it. Authorities are cited on Page 425 of the decision. The Court took the view that the builder did not acquire vested rights which could not be lost.

Also to State v. Turgeon, Ohio, (1947) 77 NE (2) 283. Defendant purchased real estate and on the same day secured a business permit. An ordinance read in part, "After permit has been issued same may be revoked if work for such permit is not commenced in six (6) months from issue." Failing to commence work the city revoked permit. A new ordinance was enacted making business use non-conforming. Defendant filed application for second permit, was refused. Mandamus ordering issuance of permit reversed.

Also Vincent Petroleum Corporation v. Culver City, 111 P (2) 433, California (1941). Plaintiff spent $68,-000.00 under a permit to drill for oil. Defendant granted several extensions of the permit, the last one up to May 30, 1937, on the condition the well be placed on commercial production before that date. Plaintiff failed to do this, permit was cancelled.

In Godson v. Town of Surfside, 8 So. (2) 497, Floriday (1942) a permit issued with the condition imbedded thereon "that it might be revoked at any time upon violation of any provision of . . . ordinances or change in plans, etc. . . ." Plaintiff began construction. Defendant cancelled permit as completed building would stand partly within a prohibited distance of Atlantic Ocean in violation of city ordinance.

Harper v. Jonesboro, 22 SE 139, Georgia, (1894). Permit issued on condition no obstruction or sidewalk, nor covering requiring posts. Plaintiff failed to observe and defendant revoked permit.

Publicity Leasing Company v. Ludwig, 158 NYS 208 (1916). February, 1914, got permit to erect a large sign. May, 1914, city adopted new ordinance limiting size of signs. Plaintiff's signs were built at cost of $1300.00. Expenditures did not create vested right, permit cancelled.

See Stringham v. Salt Lake City, Utah, (1949) 201 P (2) 758 where license reserved right in city to revoke, which it did despite heavy investment in signs by licensees.

IN ANSWER TO APPELLANT'S POINT NO. 2

Re: Vested right not lost when national emergency prevented obtaining materials.

The war emergency legislation which Appellant claimed prevented him obtaining materials was enacted in 1942 and in effect more than 3 years before Appellant made application for permit.

He was a carpenter and knew there were shortages in materials and a priority necessary when he applied for the permit, and before any money was expended received a permit which advised him of time requirements and compliance with city ordinance.

That the Appellant acquired in 1945 steel tanks, described by respondents' witness as "critically short," (Tr. 38) and pipe, difficult to obtain. (Tr. 32, 36)

That after purchase of pipe in the summer of 1946, appellant did nothing whatsoever looking toward construction until two toilets and wash basins were bought in the fall of 1947, and then nothing whatsoever again until application for a new permit October 13, 1948. Par. 13 of Findings and Exh. I, show commercial construction that was completed before and after priorities were lifted. Those completed after July 25, 1947, were finished when materials were on a "first come, first served" basis. (Tr. 70)

Authority cited by Appellant, National Yeast Corporation v. City of Crystal Lake (Page 11 of Appellant's brief) concerned an agreement made November 10, 1939, for conditions of renewal of an option in 1944. Parties were entitled to relief as war conditions could not have been anticipated in 1939.

Under facts of present case, material, controls and shortages were existing when permit issued and project was undertaken. Neither war, emergency legislation nor

shortages were unexpected conditions which prevented construction.

In National Lumber Products Company vs. Ponzio, New Jersey, (1945) 42 A (2) 753, plaintiff claimed undue hardship as he was engaged in fulfilling a war contract and sought exception to the zoning requirements. At page 756 court observes that plaintiff undertook war work with full knowledge of its equipment on hand and knew, or was charged with knowing, he could not enlarge the non-conforming use. Despite such factual and legal knowledge plaintiff apparently chose to take a chance and installed its equipment.

War emergencies no justification for suspending operation of ordinance.

Wilkins v. San Bernardino, et al, Calif. (1946) 175 P (2) 542.

IN ANSWER TO APPELLANT'S POINT NO. 3

City had power to renew . . .

Respondents' Point A is that Board of City Commission had no authority to grant exception to ordinance by renewing permit or otherwise, and reference is made to Point A for further response to Appellant's Point No. 3.

Ordinance 246 made service station at Appellant's lot a non-conforming use; any action by City Commission by resolution or otherwise to vary ordinance would be illegal.

Function of Board of Examiners and Appeals re-

ferred to by Appellant on Page 13 of brief, was to determine suitability of alternate materials and types of construction. (Fdgs. Par. 11) No authority to renew permits, override Building Inspector's denial of permit nor authorize issuance of permit for non-conforming use was among powers granted and if City Commission was acting for Board of Examiners and Appeals as Appellant suggests on Page 13, it would be limited to determining alternate materials.

The City Commission, by Ordinance 144, adopting a building code fixed the conditions for loss of permit and issuance of a new permit. (Fdgs. Par. 3) Old permit expired by limitation if work suspended for 60 days. Before work could be recommended a new permit had to be obtained issuable on payment of one-half fee providing:

A. No changes in plans and specifications.

B. That suspension had not exceeded one year.

Application failed to qualify on both conditions, having changed the plans and specifications, (Fdgs. Par. 10) and having suspended work more than 1 year. (Fdgs. Par. 4. Conc. Par. 6)

Giordano v. Mayor and Council of Borough of Dumont, New Jersey, (1948) 61 A (2) 245. The plaintiff failed to commence work in 1 year as permit required. Thereafter enactment of an ordinance making the use non-conforming, obtained a second permit and claimed it was an extension of the first permit. The lower court held that appellant obtained an extension of his permit, but the court of Errors and Appeals held at Page 246 that the first permit expired by its own limitation and having

thus expired was not susceptible of extension or renewal after its expiration.

IN ANSWER TO APPELLANT'S POINT NO. 4

Abandonment is made up of act and intent, Vol. I, Words and Phrases, Page 39., Peal vs. Gulf Red Cedar Company of California, Calif., (1936) 59 P (2) 183, and intent must be gathered from facts and circumstances of the case.

A matter of intent should be determined by the Court in its conclusions. The Court found in Paragraph 4 of Findings that Appellant failed to comply with time requirements of permit, that a great many people did find materials and did construction. Paragraph 12 of Findings and Appellant's testimony showed he made no inquiry for materials, even after lifting of priorities and materials were on a "first come, first served basis." The Court properly concluded the Appellant abandoned the construction.

Whether the Appellant abandoned the construction or not is not vital in this case, as the conditions of the permit did not require abandonment for permit to be void, only suspension of work (Exhibit A, Findings Par. 3) and Building Code specified suspension *or* abandonment to void permit.

RESPONDENTS' POINT NO. A

CITY HAD NO AUTHORITY TO ISSUE PERMIT "IN EXCEPTION TO ORDINANCE," OR GRANT RENEWAL OF PERMIT, AND CITY COMMISSION ACTED ILLEGALLY IN ATTEMPTING TO DO SO.

Cities and towns received power to enact ordinances regulating zoning by Title 15, Article 3, Utah Code Annotated, 1943. Section 15-8-95 provides for the appointment of a Board of Adjustment, Section 15-8-101, Utah Code Annotated, 1943, provides in part as follows:

> "(2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance. (3) To authorize upon appeal such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; PROVIDED, that the spirit of the ordinance shall be observed and substantial justice done."

Pursuant to these sections Ogden City enacted its ordinance No. 41-17, Board of Adjustment, which ordinance is attached to the complaint herein and by reference made a part thereof. That ordinance reads in part as follows:

> "Said board shall adopt rules, subject to the provisions of the laws of the State of Utah in such case made and provided, for the regulation of its procedure and conduct of its duties and shall have power to hear and decide special exceptions to the terms of this ordinance in specific cases where a variance from the terms of this ordinance will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in any unnecessary hardship . . ." (Complaint 016, and Tr. 3)

The Appellant here made no appeal to the Board of Adjustment but made his request directly to the City Commission. That the governing body of the city is without authority to grant an exception to an ordinance is held in the following cases:

In Lynch v. The Burough of Hillsdale, et al, in the Supreme Court of New Jersey, (1947) 54 A (2) 723, the governing body of the Burough of Hillsdale adopted a resolution purporting to grant to the defendant permission to "change the use" of a building to a non-conforming use in violation of an existing ordinance. The property owner alleges that said governing body "can do by resolution whatever the Board of Adjustment is authorized to do." The court rejects this contention and states as follows:

> "The determination of the question of variance and special exceptions has been confined by the legislature to the specialized judgment of the zoning board."

The action of the governing body in attempting to grant an exception to the ordinance was a wholly ineffective exercise of the local legislative power.

As stated in Walton v. Tracy Loan and Trust Co., 97 Utah 249, 92 Pacific (2) 724. Our Supreme Court stated as follows:

> The municipality is a creation, a creature of the legislature. It has only such powers as are granted to it by the state and such as are necessary are reasonably implied to enable it to perform the duties and functions and exercise the privileges conferred upon it.

Authority to grant exceptions to the ordinance was extended by the Utah State Legislature and by city ordinance only to the Board of Adjustment.

Chicago Railroad v. the City of Chicago, Ill., (1898) 51 N. E. 596. City ordinance required certain grade in the streets. The City Council, by resolution, sought to vary the requirements of the ordinance. The court holding their action void stated the ordinance cannot be amended, repealed or suspended by a resolution. The action which modifies or suspends the ordinance must be one of equal dignity.

In County Commissioners of Anne Arundell County v. Herbert S. Ward, Maryland Court of Appeals (April 1946) 165 ALR 816, 46 A (2) 684. The Board of County Commissioners, as an administrative body, was bound to follow the regulations it adopted, in the exercise of its delegated legislative power. The fact that it might have re-zoned the area, upon due notice and after hearing, does not alter its obligation to adhere to existing regulations, or authorize it to make special exceptions in individual cases. Chayt v. Zoning Appeal Board, 177 Md 426 9 A (2) 747, and cases cited; Sugar v. North Baltimore Methodist Protestant Church, 164 Md 487, 165 A 703. Compare County Commissioners of Prince George's County v. N. W. Cemetery Co., 160 Md 653, 154 A 452, and Gordon v. Commissioners of Montgomery Co., 164 Md 210, 164 A 676.

In the case of Potts v. Board of Adjustment, (1945) 133 NJL, 230, 43 A (2) 850 the Court said:

> Equality and uniformity of operation within the particular zone, as respects each class and kind of

buildings, are basic in the statute. Insidious distinctions and discriminations are inadmissible. The essence of zoning is territorial division according to the character of the lands and structures and their 'peculiar suitability' for particular uses, among others, and uniformity of use within the division."

In Beem v. Davis, Idaho (1918) 175 P 959, the trustees of Twin Falls, Idaho undertook to suspend the operation of the ordinance to permit the erection of a building and such action was held to be illegal and beyond their authority.

Two cases hold City Council may not grant an exception to an ordinance even by the enactment of a new ordinance for that particular purpose, are:

Mayor and City Council of Baltimore v. Boyd, 62 A (2) 588 (1948). Ordinance No. 1247 provided in paragraph No. 34 that a filling station should be permitted only by authority of public ordinance, and thereunder numerous ordinances were passed permitting the erection of filling stations. This method was subsequently abandoned and by Ordinance No. 318 the Board of Zoning Appeals was given authority to pass upon applications for permits for filling station. That their action was limited by a proviso prohibiting the filling station within three hundred feet of a theatre.

The Mayor and City Council passed Ordinance No. 117 by which they attempted to waive the provisions of paragraph 34 of Ordinance No. 247 as amended by Ordinance No. 318, to permit the erection of a filling station within three hundred feet of a motion picture theatre.

Under head notes 2-5 at Page 590 the Court says:

"The broad question in this case is how far the Mayor and City Council may make special exceptions to the Zoning Ordinance. The narrow question is whether their action in passing Ordinance No. 117 is a valid exception of such power as they may have to make exceptions.

Zoning is an exercise of the police power which, for the public good, takes away some of the rights of individuals to use their property as they please and at the same time gives them rights to restrict injurious uses of the property of others. This cannot be done by piecemeal legislation. It can only be upheld as part of the general plan for a community which sets apart certain areas for residence purposes and permits commercial business in other areas where it is established or where such use is obviously suitable."

The Baltimore City Court's action reversing the board's order was affirmed.

and

See Cassel v. Mayor and City Council of Baltimore, 73 A (2) 486. Page 488.

The Appellant's second application for a permit in October, 1948, was denied by the City Engineer who at his appearance before the City Commission was asked whether or not he had any personal objections to the permit to which the Engineer replied asking that the records show whether the permit is renewed or issued in exception to the ordinance. Whereupon it was moved and seconded that the permit be issued in exception to the ordinance. (Fdgs Par. 8, Exh. C) The action thus taken by the

City Commission was illegal and beyond their authority.

See Walton v. Tracy Loan and Trust Co. 97 Utah 249, at Page 256.

RESPONDENTS' POINT B

THE CITY WAS ACTING WITHIN ITS POLICE POWERS IN IMPOSING CONDITIONS IN PERMITS ISSUED AND FAILURE TO MEET THOSE CONDITIONS RENDERED PERMIT VOID.

The permit issued June 7, 1945, (Exh. A) advised the permittee that he must conform with all ordinances and that the permit would be void if the work was suspended for 60 days. A building code also made the permit void if work was suspended for 60 days and fixed the conditions for recommencing the work. (Fdgs. Par. 3, Exh. H)

Cases dealing with conditions and time requirements and expiration of permits are as follows:

Giordano v. Mayor and Council of Borough of Dumont, New Jersey, (1948) 61 A (2) 245. Plaintiff in the early part of 1945 acquired title to a plot of ground and on June 19, 1945, obtained building permit to erect a gasoline station thereon. The building code provided, inter alia, that "any permits which may be issued by the building inspector . . . under which no work is commenced within one year from the time of the issuance shall expire at the end of that time." For more than one year after permit was issued no work was done toward erection or construction of gasoline station, so under the

building code the building permit expired. On July 8, 1946, the defendants amended the zoning ordinance to prohibit filling stations on the plaintiff's premises, and five months after the adoption of the new ordinance the plaintiff applied for and had issued to him a building permit to erect a gasoline station on the same premises. A new building inspector took office January 1, 1947, and caused letters to be addressed to the plaintiff stating the permit had been issued contrary to the amended ordinance and was revoked. The court below held that the appellant obtained an extension of his building permit and appellant argues that the second permit was an extension or renewal of the first permit. The proofs do not disclose any written application for either building permit, although two permits are shown, No. 3253 issued on June 19, 1945, and No. 3686 issued on December 9, 1946. In the latter permit there is no mention of its being an extension or renewal of the first permit. The appellant concedes that no work had been commenced within one year from June 19, 1945, the date of issuance of the first permit; it therefore expired by its own limitation and, having thus expired, was not susceptible of extension or renewal after its expiration. According, we do not agree that the second permit was an extension or renewal of the first permit.

The lower court's action in upholding the revocation of the permit was affirmed in this appeal.

In Sun Oil Co. v. Borough of Bradley Beach, Supreme Court of New Jersey, (1947) 55 A (2) 778. March, 1945, the plaintiff entered into an agreement to purchase the property in question. On June 26, 1945, a permit to

erect a service station was obtained. The title of the property was not taken by the plaintiff until March 15, 1946. On March 12, 1946, the defendant, by resolution, placed a 30-day time limit for the commencement of work under a building permit and by resolution on June 2, 1946, an ordinance was adopted precluding the erection of service stations in the area. After the cancellation of the permit the plaintiff commenced excavation and grading which work was stopped and he thereafter brought this action to review the resolution of the board in revoking his permit. The court held that the city had the power to change the ordinance in the interest of the publice and to fix a time in which work must be commenced, and put aside the claim of the plaintiff that it had a vested right having acted on the faith of the permit and had expended large sums of money by reason thereof.

In Vincent Petroleum v. Culver City, (1941) 111 P (2) 433, plaintiff obtained a permit to drill for oil and spent approximately $68,000.00. Its permit was renewed a number of times, the last time on the condition that the well be placed on a commercial production basis by May 30, 1937. The plaintiff failed to do this and the permit was cancelled, which action was upheld.

In the case State v. Turgeon, Ohio, (1947) 77 NE (2) 283, the owner secured a permit but did not commence work in 6 months as required by the permit so the Mayor revoked it as the ordinance authorized. The defendant made application for a new permit which was refused on the grounds that a new ordinance had been enacted making the use sought by the permit non-conforming. Mandamus for the issuance of the permit was denied.

In the case Colonial Beacon Oil Company v. Finn, 283 N.Y.S. 384 (1935), from a peremptory order of mandamus directing the issuance of a permit for the erection of petroleum tanks, the defendant's appeal. Ordered reversed and application dismissed. The city ordinance required that before any permit be issued, complete plans must be submitted to the Bureau of Buildings and approved by the superintendent. A further ordinance regulates the construction and installation of tanks or storage of petroleum products with requirements as to kinds and sizes of material, manner of construction, capacity, and location. The building superintendent issued a temporary permit which was cancelled when the plans filed showed non-compliance with the minimum distance requirements of the ordinance. The holder of the permit, by failing to comply with the conditions of the ordinance made the cancellation of the permit by the building superintendent in order.

The permit issued the Appellant June 7, 1945, expired and became void by reason of the Appellant suspending work for more than 60 days. The Appellant also lost his right to recommence work under the building code, (Exh. H) by suspension and abandoning work exceeding one year and by changing the original plans and specifications in his second application for a permit October 13, 1948. The Appellant evidenced his abandonment of the first permit as found by the court in its Conclusions by making application for a permit for a different use, that is a service station in place of a station and store as first set out in the first application and permit by prescribing a different sized building estimated cost at

$8,000.00 in place of $3,000.00 and by paying the full fee on the second permit which carries no indication that it was a renewal of the first permit.

RESPONDENTS' POINT C.

THE RESPONDENTS ARE ENTITLED TO HAVE A PERMANENT WRIT OF INJUNCTION AS PRAYED AND ORDERED BY THE DISTRICT COURT.

The Appellant having lost all rights under the first permit by his failure to meet the conditions therein fixed, and that permit being, therefore, void, further construction would be without a permit and for a non-conforming use.

The second permit having been issued without authority is a nullity and Appellant could do no further construction under it. See 6 ALR (2) 960. Rights of permittee under illegally issued building permit.

Respondents are entitled to have the intended construction halted and Ordinance No. 246 observed and a permanent injuction issued. The respondents will suffer special damage by erection of a service station, (Fdgs. Par. 1) and are entitled to maintain this action seeking an injuction.

See Cassel v. Mayor, 73 A (2) 486. "Court of Equity has jurisdiction to grant injuctive relief against the violation of zoning ordinances on the complaint of an individual sustaining special damage as a result of the violation."

See 54 ALR 361.

Fitzgerald v. Merard Holding Company, 138 A 483, Connecticut, (1927).

Respectfully submitted,

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